

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

HACHETTE BOOK GROUP, INC.,
HARPERCOLLINS PUBLISHERS LLC,
JOHN WILEY & SONS, INC., and
PENGUIN RANDOM HOUSE LLC

Plaintiffs,

v.

INTERNET ARCHIVE and DOES 1 through
5, inclusive

Defendants.

Case No. 1:20-CV-04160-JGK

ORAL ARGUMENT REQUESTED

**DECLARATION OF JOSEPH C. GRATZ IN SUPPORT OF DEFENDANT INTERNET
ARCHIVE'S MOTION FOR SUMMARY JUDGMENT**

I, Joseph C. Gratz, declare as follows:

1. I am an attorney licensed to practice in the state of California, and represent for Defendant Internet Archive in this matter. I make this declaration from personal knowledge, and if called to testify, I could and would testify competently to the facts stated herein.
2. Attached hereto as **Exhibit A** is a true and correct copy of the Stipulation of Undisputed Facts entered into by the parties to this matter on June 10, 2022.
3. Attached hereto as **Exhibit B** is a true and correct copy of excerpts from the Supplemental Expert Report of Prof. Ian Foster, served in this matter on March 31, 2022.
4. Attached hereto as **Exhibit C** is a true and correct copy of excerpts from the corrected transcript of the deposition of Steve Potash, taken in this matter on January 31, 2022.
5. Attached hereto as **Exhibit D** is a true and correct copy of a document produced by Plaintiff HarperCollins Publishers LLC, in this matter assigned Bates number HC0030132.
6. Attached hereto as **Exhibit E** is a true and correct copy of a document produced by Plaintiff Penguin Random House LLC, in this matter assigned Bates number PRH0072194.
7. Attached hereto as **Exhibit F** is a true and correct copy of a document produced by Plaintiff Hachette Book Group, Inc., in this matter assigned Bates number HACHETTE0012377.
8. Attached hereto as **Exhibit G** is a true and correct copy of the Position on Controlled Digital Lending issued on June 2, 2021, by the International Federation of Library Associations and Institutions, available at https://repository.ifla.org/bitstream/123456789/1835/1/ifla_position_-_en-controlled_digital_lending.pdf.

9. Attached hereto as **Exhibit H** is a true and correct copy of the Public Libraries Association's post entitled, "Public Libraries Respond to COVID-19: Survey of Response & Activities," available at <https://www.ala.org/pla/issues/covid-19/march2020survey>.

10. Attached hereto as **Exhibit I** is a true and correct copy of an article posted on March 6, 2020 (updated on October 13, 2021) to the website of *EducationWeek* entitled "Map: Coronavirus and School Closures in 2019-2020," available at <https://www.edweek.org/leadership/map-coronavirus-and-school-closures-in-2019-2020/03>.

11. Attached hereto as **Exhibit J** is a true and correct copy of excerpts from the transcript of the deposition of Adam Silverman, taken in this matter on December 6, 2021.

12. Attached hereto as **Exhibit K** is a true and correct copy of an article by Jill Lepore published in *The New Yorker* on March 26, 2020, entitled "The National Emergency Library Is a Gift to Readers Everywhere," available at <https://www.newyorker.com/books/page-turner/the-national-emergency-library-is-a-gift-to-readers-everywhere>.

13. Attached hereto as **Exhibit L** is a true and correct copy of a Public Libraries Survey from the website of the Institute of Museum and Library Services, available at <https://www.imls.gov/research-evaluation/data-collection/public-libraries-survey>.

14. Attached hereto as **Exhibit M** is a true and correct copy of an entry on WorldCat for *The lion, the witch, and the wardrobe*, available at <https://www.worldcat.org/title/lion-the-witch-and-the-wardrobe/oclc/28291231>.

15. Attached hereto as **Exhibit N** is a true and correct copy of excerpts from the transcript of the deposition of Skip Dye, taken in this matter on November 18, 2021.

16. Attached hereto as **Exhibit O** is a true and correct copy of an article by Jim Milliot dated February 24, 2017, posted to the website of *Publishers Weekly* entitled, “Ranking America’s Largest Publishers”, available at <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/72889-ranking-america-s-largest-publishers.html>.

17. Attached hereto as **Exhibit P** is a true and correct copy of excerpts from the 2018 Annual Report of Bertelsmann. The entire document is available at <https://www.bertelsmann.com/media/investor-relations/annual-reports/bertelsmann-annual-report-2018-finance-engl.pdf>.

18. Attached hereto as **Exhibit Q** is a true and correct copy of excerpts from the 2019 Annual Report of Bertelsmann. The entire document is available at <https://www.bertelsmann.com/media/investor-relations/annual-reports/annual-report-2019-financial-information-2.pdf>.

19. Attached hereto as **Exhibit R** is a true and correct copy of excerpts from the 2021 Annual Report of Bertelsmann. The entire document is available at <https://www.bertelsmann.com/media/investor-relations/annual-reports/annual-report-2021.pdf>.

20. Attached hereto as **Exhibit S** is a true and correct copy of excerpts from the 2020 Form 10-K filed by John Wiley & Sons, Inc. with the United States Securities and Exchange Commission. The entire document is available at <https://investors.wiley.com/financials/sec-filings/sec-filings-details/default.aspx?FilingId=14241927>.

21. Attached hereto as **Exhibit T** is a true and correct copy of excerpts from the 2021 Form 10-K filed by John Wiley & Sons, Inc. with the United States Securities and Exchange Commission. The entire document is available at <https://investors.wiley.com/financials/sec-filings/sec-filings-details/default.aspx?FilingId=15076679>.

22. Attached hereto as **Exhibit U** is a true and correct copy of excerpts from the 2019 Annual Report of News Corp. The entire document is available at
https://www.annualreports.com/HostedData/AnnualReportArchive/n/NASDAQ_NWS_2019.pdf

23. Attached hereto as **Exhibit V** is a true and correct copy of excerpts from the 2021 Annual Report of News Corp. The entire document is available at <https://newscorp.com/wp-content/uploads/2021/10/News-Corp-2021-Annual-Report.pdf>.

24. Attached hereto as **Exhibit W** is a true and correct copy of excerpts from the English-language version of 2018 Universal Registration Document filed by Lagardère with the French government. The entire document is available at
https://www.lagardere.com/fichiers/fckeditor/File/actionnaires%20individuels/assemblee_generale/2019/Documents/190405_Lagardere_Reference_Document_Fiscal_Year_2018.pdf.

25. Attached hereto as **Exhibit X** is a true and correct copy of excerpts from the English-language version of 2020 Universal Registration Document filed by Lagardère with the French government. The entire document is available at
https://www.lagardere.com/fichiers/fckeditor/File/Relations_investisseurs/Publications/2021/Rapport_Annuel/210531_URD_2020_EN.pdf.

26. Attached hereto as **Exhibit Y** is a true and correct copy of excerpts from the English-language version of 2021 Universal Registration Document filed by Lagardère with the French government. The entire document is available at
https://www.lagardere.com/fichiers/fckeditor/File/actionnaires%20individuels/assemblee_generale/2022/URD/220405_Lagardere_SA_URD_EN.pdf.

27. Attached hereto as **Exhibit Z** is a true and correct copy of an article by James Milliot dated January 29, 2021, posted to the website of *Publishers Weekly* entitled, “A Year for the (Record) Books in Publishing”, available at <https://www.publishersweekly.com/pw/by-topic/industry-news/bookselling/article/85453-a-year-for-the-record-books.html>.

28. Attached hereto as **Exhibit AA** is a true and correct copy of an article by James Milliot dated April 1, 2022, posted to the website of *Publishers Weekly* entitled, “America’s Biggest Publishers Keep Posting Profits”, available at <https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/88925-america-s-biggest-publishers-keep-posting-a-profit.html>.

29. Attached hereto as **Exhibit BB** is a true and correct copy of a *New York Times* article by Elizabeth Harris dated December 29, 2020 (updated October 4, 2021) entitled “Surprise Ending for Publishers: In 2020, Business Was Good”, available at <https://www.nytimes.com/2020/12/29/books/book-publishing-2020.html>.

30. Attached hereto as **Exhibit CC** is a true and correct copy of excerpts from the transcript of the deposition of Josh Marwell, taken in this matter on December 3, 2021.

31. Attached hereto as **Exhibit DD** is a true and correct copy of a document produced in this matter pursuant to subpoena by non-party Overdrive, Inc., assigned Bates number OverDrive_Supp_002.

32. Attached hereto as **Exhibit EE** is a true and correct copy of excerpts from the transcript of the deposition of Jeffrey Prince, taken in this matter on June 9, 2022.

33. Attached hereto as **Exhibit FF** is a true and correct copy of excerpts from the transcript of the deposition of Alison Lazarus, taken in this matter on November 12, 2021.

34. Attached hereto as **Exhibit GG** is a true and correct copy of excerpts from the transcript of the deposition of Chantal Restivo-Alessi, taken in this matter on December 1, 2021.

35. Attached hereto as **Exhibit HH** is a true and correct copy of excerpts from the transcript of the deposition of Alan Pavese, taken in this matter on December 10, 2021.

36. Attached hereto as **Exhibit II** is a true and correct copy of excerpts from the September 3, 1976, United States House of Representatives Report No. 94-1476, "Copyright Law Revision."

37. Attached hereto as **Exhibit JJ** is a true and correct copy of a document produced by Plaintiff Hachette Book Group, Inc. in this matter assigned Bates number HACHETTE0002474.

38. Attached hereto as **Exhibit KK** is a true and correct copy of a document produced by Plaintiff Hachette Book Group, Inc. in this matter assigned Bates number HACHETTE0002475.

39. Attached hereto as **Exhibit LL** is a true and correct copy of a document produced by Plaintiff HarperCollins Publishers LLC in this matter assigned Bates number HC0010272.

40. Attached hereto as **Exhibit MM** is a true and correct copy of a document produced by Plaintiff Penguin Random House LLC in this matter assigned Bates number PRH0025907.

41. Attached hereto as **Exhibit NN** is a true and correct copy of a document produced by Plaintiff John Wiley & Sons, Inc. in this matter assigned Bates number WILEY0005650.

42. The Internet Archive propounded the following Requests for Production on each Plaintiff, but Plaintiffs did not produce the requested commercial performance data.

a. For each Work-in-Suit, Documents sufficient to show on a monthly basis the amount of Your revenue, expenses, and profits related to that Work. (RFP No. 20)

b. Documents sufficient to show on a monthly basis, beginning when You obtained any copyright interests in any Work-in-Suit, Your total revenues, profits, expenses, cash-on-hand, and debt. (RFP No. 22)

c. For each Work-in-Suit, Documents sufficient to show the number of physical copies embodying the Work-in-Suit, divided by distribution channel in the most granular manner available. To the extent You obtained interest in a Work-in-Suit from June 2011 to June of 2020, the Internet Archive seeks documents sufficient to show this data on a monthly basis. To the extent You obtained interest in a Work-in-Suit before 2011, the Internet Archive will accept documents sufficient to show annual data. (RFP No. 60)

d. For each Work-in-Suit, Documents sufficient to show the number of ebooks embodying the Work-in-Suit and the number of ebook loans, divided by distribution channel in the most granular manner available. To the extent You obtained interest in a Work-in-Suit from June 2011 to June of 2020, the Internet Archive seeks documents sufficient to show this data on a monthly basis. To the extent You obtained interest in a Work-in-Suit before 2011, the Internet Archive will accept documents sufficient to show annual data. (RFP No. 62)

e. Documents sufficient to show the number of all physical books, divided by distribution channel in the most granular manner available, beginning when You obtained any copyright interest in any Work-in-Suit. The Internet Archive seeks documents sufficient to show this data on a monthly basis for the time span of June 2011 to June 2020. To the extent responsive information predates 2011, the Internet Archive will accept documents sufficient to show annual data. (RFP No. 64)

f. Documents sufficient to show the number of all ebooks and the number of ebook loans, divided by distribution channel in the most granular manner available, beginning when You obtained any copyright interest in any Work-in-Suit. The Internet Archive seeks documents sufficient to show this data on a monthly basis for the time span of June 2011 to June 2020. To the extent responsive information predates 2011, the Internet Archive will accept documents sufficient to show annual data. (RFP No. 65)

g. Documents sufficient to show the income You received from sales of physical books, divided by distribution channel in the most granular manner available, beginning when You obtained any copyright interest in any Work-in-Suit. The Internet Archive seeks documents 9 sufficient to show this data on a monthly basis for the time span of June 2011 to June 2020. To the extent responsive information predates 2011, the Internet Archive will accept documents sufficient to show annual data. (RFP No. 66)

h. Documents sufficient to show the income You received from any transaction relating to ebooks, including without limitation sales, licenses, or loans of ebooks, divided by distribution channel in the most granular manner available, beginning when You obtained any copyright interest in any Work-in-Suit. The Internet Archive seeks documents sufficient to show this data on a monthly basis for the time span of June 2011 to June 2020. To the extent responsive information predates 2011, the Internet Archive will accept documents sufficient to show annual data. (RFP No. 67)

43. Hachette was the only Plaintiff to produce monthly data for all of its Works in Suit, but Hachette only produced this data for 2020. Gratz Decl. Ex. JJ (HACHETTE0002475). Hachette produced annual data for 2015 to 2019. *Id.* Ex. KK (HACHETTE0002474).

44. For its Works in Suit, HarperCollins produced annual data for 2017 to 2020. *Id.* Ex. LL (HC0010272).

45. For its Works in Suit, Penguin Random House produced annual data for 2010 to 2020. *Id.* Ex. MM (PRH0025907).

46. For its Works in Suit, Wiley produced annual data for 1996 to 2020. *Id.* Ex. NN (WILEY0005650).

47. None of the Plaintiffs produced the requested sales or revenue information for titles that are not Works in Suit.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 7, 2022, in San Francisco, California.

/s/ Joseph C. Gratz

JOSEPH C. GRATZ

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2022 the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing to the attorneys of record in this case.

/s/ Joseph C. Gratz
JOSEPH C. GRATZ